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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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Federal Communications Commission
Office of Secretary

In the Matter of	)	
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Implementation of the Telecommunications Act of 1996:	)	CC Docket No. 96-115
	)	
Telecommunications Carriers' Use of Customer Proprietary Network Information and other Customer Information	)	

REPLY COMMENTS OF COX ENTERPRISES, INC.

Cox Enterprises, Inc. ("Cox"), by its attorneys, herein replies to comments filed with the Federal Communications Commission (the "Commission") in response to the Common Carrier Bureau's public notice posing questions on statutory requirements for disclosure of customer proprietary network information ("CPNI").[1] As shown below, the Commission should be mindful of the dual Congressional objectives of protecting both privacy and competition and should reject BOC efforts to use Section 272 and 274 to weaken the protections of Section 222.

I. Introduction.

In establishing rules to implement the CPNI provisions of the 1996 Act, the Commission must interpret Sections 222, 272 and 274 strictly and must apply these provisions to achieve all of Congress' objectives. These objectives are twofold: (1) to protect customer rights in the disclosure of sensitive and "private" information; and (2) to safeguard the development of competition by limiting the manner in which CPNI can be shared by a company with both its affiliates and third parties. Unsurprisingly, the BOCs ask the Commission to ignore this careful balancing, to permit them to gain unlawful access to CPNI and to use the information to the

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1/ *See Public Notice*, "Common Carrier Bureau Seeks Further Comment on Specific Questions in CPNI Rulemaking," CC Docket No. 96-115, DA 97-385 (rel. February 20, 1997).

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detriment of new competitors. Indeed, some BOCs even claim that Sections 272 and 274 of the 1996 Act, which require them to separate their long distance, manufacturing and electronic publishing operations from their core local telephone businesses, concurrently empower them to treat their affiliates as integrated for the express purpose of sharing CPNI. This reading turns the statute on its head.

Because CPNI directly affects the ability to compete, and "is one of the most valuable commercial properties,"[2/] the rules must be clear and provide consumers with affirmative control over their own CPNI. It is critical that the Commission adopt rules that safeguard against both historic and potential future abuses. As evidenced by MCI's comments, anti-competitive use of CPNI tangibly disadvantages competitors in enlisting new customers and targeting new markets.[3/]

II. Section 222 Is Intended to Protect Customer Privacy *and* Promote Competition (Questions 1, 2).

As a general matter, the focus of the comments submitted by the BOCs in this proceeding is misplaced. While they correctly recognize customer privacy interests, they do not address the competitive concerns that also underlie Sections 222.[4/] Indeed, Section 222 was drafted to address the competitive use of CPNI by all telecommunications carriers seeking to enter new

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2/ *See Comments of U S West* at 22.

3/ *See Further Comments of MCI Telecommunications Corporation* at 2 (stating that SNET regularly provides its interLATA affiliate with information that is not provided to third parties based on the claim that it is CPNI).

4/ *See, e.g., Comments of Pacific Telesis Group* at 2 ("The Commission should focus on the fundamental purpose of the CPNI provision — to protect customer privacy . . . ."); *Comments of SNET* at 4 ("Section 222 . . . was intended primarily to protect customer privacy . . . ."). *But see Notice of Proposed Rulemaking*, CC Docket No. 96-115, 11 FCC Rcd 12513, ¶ 2 (1996) (expressing the Commission's intent to adopt "a regulatory regime that balances consumer privacy and competitive considerations . . . ."); *Further Comments of MCI* at 5-6; *Comments of the Telecommunications Resellers Association* at 3.

markets. The legislative history of the CPNI provisions confirms that Congress intended to strike a balance in crafting limitations on CPNI use that would protect customer privacy interests *and* promote competition. [5]

For that reason, the Commission, in implementing Section 222, should recognize that different types of CPNI raise different levels of concern and may implicate different forms of "affirmative" consent. At the lowest level (the use of so-called "aggregate CPNI"), oral consent to use may be permissible without specific disclosures of how the information will be used. At the next level, information that has competitive value but which raises more sensitive privacy concerns, such as the volume of a customer's use of a service, should be subject to more rigorous requirements, including specific, written disclosures of how the information will be used and formal records of consent. Finally, the most sensitive level of extremely private information, such as the specific phone numbers called by a customer, should be available only after the customer receives a complete written disclosure describing all permitted uses of the information and gives specific written consent. These varying degrees of treatment based upon the type of CPNI implicated will address the dual goals of Section 222: the protection of customer privacy and the enhancement of competition in the telecommunications marketplace.

Because different types of CPNI have different privacy implications, BOC surveys that purportedly support the position that CPNI can be more freely shared with BOC Section 272 and 274 affiliates than with third parties are unpersuasive. Significantly, these surveys do not identify the specific information that is to be shared and do not include a description of the full scope of CPNI, *e.g.*, that it includes the numbers called by the consumer and the length of the calls. Consumer reaction to the sharing of this extremely private information is very different

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5/ *See* Joint Statement of Managers, S. Conf. Rep. No. 104-230, 104th Cong., 2nd Sess. 203, 205 (1996) ("Conference Report") (Section 222 "strives to balance both competitive and consumer privacy interests with respect to CPNI").

than to sharing ill-defined "information about telephone service." Indeed, the lack of specificity in the surveys makes them entirely useless and unreliable in determining whether intra-company CPNI transfers are "assumed" by telecommunications customers.

III. Sections 272 and 274 Impose Additional Limitations on BOCs that Include Express Discrimination Prohibitions (Questions 1, 2, 3, 5, 6, 7, 8, 14, 16, 18, 19, 21, 22, 23).

Section 222 is a general statutory provision governing the use of CPNI by all "telecommunications carriers." Sections 272 and 274, however, impose specific and *additional* structural and transactional requirements on BOC in-region long distance services, manufacturing and interLATA information services. Consequently, these provisions must be interpreted in a manner consistent with the *continuing* obligations imposed on all telecommunications carriers under Section 222. An interpretation of the provisions of Sections 272 and 274 that is inconsistent with Section 222 would permit BOCs to unlawfully share information with their separated affiliates during the period in which Sections 272 and 274 remain in effect. This would contradict the express language of the statute, as well as Congress' intent to restrict the shared use of information between the BOCs and their subsidiaries.

Contrary to BOC claims, the non-discrimination provisions of Section 272 and 274 of the 1996 Act create obligations for BOCs that are in addition to the requirements of Section 222. These provisions mandate that Section 272 and 274 BOC affiliates be treated as third parties under Section 222 and that BOCs obtain affirmative consent before sharing CPNI that is used to market services other than local exchange service. Unless affirmative consent is required, BOCs would be permitted to share sensitive information with subsidiaries or affiliates more easily than with third parties. Such a result would be contrary to the non-discrimination requirements of Sections 272 and 274, as well as Congress' intent to minimize the potential for BOC anti-competitive use of CPNI.

To support their plea for free and discriminatory CPNI exchanges between BOCs and their Section 272 and 274 affiliates, the BOCs also argue that customers "expect" BOCs to share information with their affiliates. This claim ignores the reasons for the Congressional mandate that separated affiliates be established to deliver certain BOC services.[6/] It is incontrovertible that Congress, in passing the 1996 Act, intended to limit, to the greatest extent possible, the ability of BOCs to leverage their monopoly power over the local exchange into new services; indeed, Congress took steps to safeguard against such competitive abuse. Sections 272 and 274 specifically were drafted to limit the manner in which the BOCs are able to provide interLATA, electronic publishing, and manufacturing services.

Significantly, Congress intentionally restricted the ability of BOCs to provide "one-stop shopping" to their customers because it recognized the competitive harm that would result from such unrestricted integration and cooperation. It is illogical and contrary to the 1996 Act, therefore, for the BOCs to complain that limiting access to CPNI by their separated affiliates prevents them from competing with other companies that are not so restricted.[7/] Moreover, the BOCs substantially overstate their need for CPNI to cross-market services and to compete with other carriers who offer competitive services.[8/]

6/ The BOCs make a number of broad and improper distinctions between "internal" and "external" disclosure that raise substantial competitive concerns and that are unsupported by the 1996 Act. *See, e.g., Comments of Ameritech* at 6; *Comments of Bell Atlantic and NYNEX* at 3; *Comments of BellSouth* Corporation at 16; *Comments of U S West* at iii. Such attempts to distort Congressional mandates must be summarily rejected.

7/ *See, e.g., Comments of BellSouth* at 21-22 (claiming that Congress intended Section 272(g) and 271(e)(1) to operate in tandem to provide parity between BOCs and other telecommunications carriers in their ability to offer one-stop shopping for telecommunications services); *Comments of U S West* at 7 (stating that CPNI will form the foundation for the one-stop shopping the 1996 Act seeks to promote).

8/ *See, e.g., Comments of SBC Communications, Inc.* at 13-14 ("joint marketing 'necessarily involves' sharing of CPNI"). As explained by Cox in its original comments, BOCs do not need CPNI to jointly market services with affiliated companies. *See Comments of Cox*

Contrary to BOC claims, Section 272(g) also does not nullify the non-discrimination obligations of Section 272, or permit BOCs to discriminate under Section 222 in the use and disclosure of CPNI.[9] As explained in Cox's initial comments, Section 272(g)(3) does not "exempt" the activities described in Sections 272(g) from the non-discrimination obligations of Section 272(c)(1). Rather, Section 272(g)(3) provides only that the joint marketing permitted between BOCs and their affiliates under Section 272(g) is not a *per se* violation of the non-discrimination safeguards in Section 272.[10] While Section 272(g) may permit exclusive joint marketing arrangements, it does not validate discriminatory use of CPNI under Section 222. Indeed, Section 222(g) only exempts BOCs from the non-discrimination provision to the extent their joint marketing activities do not rely on or disclose CPNI.[11]

The non-discrimination provisions of Sections 272 and 274 also mandate that the BOCs provide "solicitation services" to other carriers. Because of their unique access to CPNI and the significant potential for anti-competitive activity and discrimination, BOCs must offer competitors the same type of access to potential customers when they initiate steps to solicit CPNI, whether in the context of inbound or outbound marketing efforts. Thus, the same *form* of consent made available to BOC affiliates must be made available to competitors if the mandates

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Enterprises, Inc. at 8-9; *see also Comments of the Telecommunications Resellers Association* at 13 ("Providing for use, disclosure and/or access to CPNI may impact the success of a marketing effort, but it is not part of that undertaking"); *Comments of WorldCom* at 18 ("it is a considerable (and unsupported) stretch to term CPNI essential for a BOC . . . to engage in joint marketing").

9/ *See Comments of BellSouth* at i, 2-3, 11-13; *Comments of Ameritech* at 4-5; *Comments of Pacific Telesis* at 3, 7, 15, 22-24); *Comments of U S West* at 4-5, 21.

10/ *See, e.g., Comments of WorldCom* at 13; *Comments of MCI* at 12, 21-22, 26, 28, 31; *Comments of Sprint Corporation* at 1, 12; *Comments of the Telecommunications Resellers Association* at 8.

11/ *See, e.g., Comments of Sprint Corporation* at 12; *Comments of WorldCom* at 1, 4-6 ("Section 272(c)(1) represents nothing short of an 'unqualified prohibition against discrimination by a BOC in its dealings with Section 272 affiliates and unaffiliated entities'").

of the 1996 Act are to be met.[12] For instance, if the BOC attempts to solicit customer approval through the use of bill inserts, non-BOC affiliated competitors must be provided an opportunity to include similar requests in bill mailings. BOC efforts to create distinctions that would permit them to prefer their affiliates in the solicitation and exchange of CPNI cannot be reconciled with the explicit non-discrimination provisions of Sections 272 and 274.[13]

The Commission should confirm that requiring BOCs to offer "solicitation services," if they solicit consent to use CPNI on behalf of affiliates, does not raise First Amendment issues. If the BOC does not want to offer a solicitation service to unaffiliated third parties, as mandated by non-discrimination provisions of Sections 272 and 274, it need only decline to: (a) solicit CPNI on behalf of its affiliates; or (b) seek to use CPNI obtained from its affiliates to enlist new customers or sell new service packages. The non-discrimination provisions do not prevent either the BOC or its affiliates from seeking consent; they merely prevent the BOC from leveraging its local exchange monopoly to the detriment of competitors. Indeed, the requirement to offer solicitation services is less burdensome on speech than the leased access provisions that require cable operators to make capacity on their systems available to third parties. The BOCs' "commercial speech" in this context, therefore, is not unduly burdened, especially in light of the constitutional standards that permit a higher level of federal regulation of commercial speech.[14]

12/ *See Comments of the Telecommunications Resellers Association* at 11 ("Ensuring that any . . . 'approval solicitation service' does not favor the BOC's Section 272 affiliate raises the same questions this Commission confronted in addressing the obligation of the incumbent local exchange carriers to provide non-discriminatory provision of operation support services.").

13/ *See* 47 U.S.C. § 272(c) and 274(c).

14/ *See generally Central Hudson Gas and Electric Corp. v. PUC of NY*, 447 US 557 (1980); *MetroMedia, Inc. v. San Diego*, 453 U.S. 490 (1981); *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986).

IV. Opt-Out Approval Is Not a Statutorily Permitted Form of Customer Approval (Questions 2, 17, 18, 20, 21, 23).

Section 222 of the 1996 Act is clear as to what is required for the disclosure of CPNI. It does not distinguish between affiliated and non-affiliated companies and is not ambiguous as to what type of customer approval is required for the use and disclosure of CPNI. Congress provided that disclosure of CPNI may be made only pursuant to the customers' "affirmative" consent. BOC assertions that they may provide affiliates with CPNI without actual consent, through opt-out provisions or "tacit" or "implied" approval, are contrary to express provisions of the 1996 Act.[15/]

Several BOCs claim that "opt out" consent is permissible. For instance, U S West states that it can disclose CPNI to its Section 272 affiliate based on "tacit" and "implied" consents but would require oral or written customer approvals to disclose CPNI to non-affiliated entities.[16/] Likewise, Pacific Telesis argues that notice and opt-out approvals are only valid for CPNI sharing with its affiliated company and the same type of approval would not be appropriate for disclosure to third parties.[17/] This interpretation of the statute is plainly incorrect. Section 222 simply was never intended to provide less protection to CPNI in the hands of BOCs than that provided in the hands of other telecommunications carriers.[18/] Indeed, as described above, to interpret Section 222 in this way would stand in stark contrast to many other provisions in the

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15/ Several BOCs suggest that only affiliated companies can act on a customer's opt-out "approval" and that a different and more stringent standard must apply to third party disclosure. *See, e.g., Comments of Bell South* at 30-31. These interpretations are contrary to the 1996 Act and stand in direct contrast to Congress' intent to limit BOC's activities and disclosures in respect to their 272 and 274 affiliates. *See supra* Part III.

16/ *See Comments of U S West* at 6.

17/ *See Comments of Pacific Telesis* at 5.

18/ *See, e.g., Comments of MCI* at 6.

1996 Act that expressly limit BOC activities to protect the development of competition in "competitive" markets.[19]

Moreover, and as described in Cox's initial comments, Congress has demonstrated that where it intends to permit opt-out approvals, it has provided expressly that opt-out approvals are acceptable means of consent.[20] In the context of Section 222, however, opt-out approval is neither permitted nor preferred. Even in Section 222(d)(3), an exception to the general CPNI rules, Congress requires *affirmative* verbal approval from the customer before CPNI can be accessed or disclosed. It would be illogical for Congress to have drafted a general rule that is less stringent than the exception in this context. Any mechanism that results in customer approval, therefore, must involve affirmative customer action to satisfy the provisions of Section 222.[21]

V. Conclusion

The Commission should interpret Sections 222, 272 and 274 of the 1996 Act consistent with Congressional intent to protect consumer privacy and fair competition. Specifically, the Commission should confirm that Sections 272 and 274 provide *additional* protection against

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19/ Indeed, while the scope of any disclosure will always depend on customer wishes, the manner in which BOCs and their affiliates share CPNI is directly limited by the competitive safeguards of Sections 272 and 274.

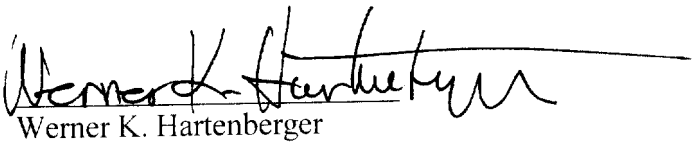
20/ *See* 18 U.S.C. § 2721(b)(11) (Driver's Privacy Protection Act) ("For any other use in response to requests for individual motor vehicle records if the motor vehicle department has provided in a clear and conspicuous manner on forms for issuance or renewal of operator's permits, titles, registrations, or identification cards, notice that personal information collected by the department may be disclosed to any business or person, and has provided in a clear and conspicuous manner on such forms an opportunity to prohibit such disclosures").

21/ Moreover, it would be contrary to statutory mandate for the Commission to assume that opt-out approval constitutes "affirmative" approval. In respect to opt-out bill stuffers in particular, affirmative approval is seldom given because mailings can and are largely ignored by customers.

anti-competitive BOC behavior, and do not affect the continued application of Section 222 to BOC use and disclosure of CPNI.

Respectfully submitted,

COX ENTERPRISES, INC.



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March 27, 1997

CERTIFICATE OF SERVICE

I, V. Lynne Lyttle, a secretary at the law firm of Dow, Lohnes & Albertson, do hereby certify that on this 27th day of March, 1997, I caused copies of the foregoing "Reply Comments of Cox Enterprises, Inc." to be served via hand-delivery to the following:

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